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ABSTRACT

In February 1987, at a statewide meeting of North Carolina school board attorneys, it was revealed that most school board attorneys were not consulted about and had never seen the construction contracts executed by their clients. The general practice in the state was that the architects prepared the contracts using the standard American Institute of Architects (AIA) forms and submitted them to the superintendent for execution by the owner. To provide greater contractual protections for the owner, the North Carolina Council of School Attorneys appointed a committee to draft a set of suggested amendments to the standard forms for the use of council members. Many of the amendments apply to states like North Carolina, which requires that public construction contracts be awarded by competitive bids to multiple prime contractors. The suggested amendments, additions, and deletions refer to the owner-architect agreement in the following areas: (1) architect's responsibilities; (2) scope of architect's basic services; (3) additional services; (4) owner's responsibilities; (5) construction cost; (6) use of architect's drawings, specifications, and other documents; (7) arbitration; (8) termination, suspension, or abandonment; (9) miscellaneous provisions; (10) basis of compensation; (11) other conditions or services; and (12) form of agreement. (MLF)

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The AIA Standard Form of Agreement Between Owner and Architect, B141, 1987 Edition - What the School Board Attorney Needs to Know

by

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I. INTRODUCTION

In February of 1987, at a state-wide meeting of North Carolina school board attorneys, we learned that most school board attorneys were not consulted about and, in fact, had never seen the construction contracts executed by their clients. The general practice in our state was that the architects prepared the contracts using the standard AIA forms and submitted them to the superintendent for execution by the Owner. When the attorneys became aware that a few of them, including myself, had some concerns about the wording of those standards forms and had advised our clients to amend them in order to provide greater contractual protections for the Owner, the North Carolina Council of School Attorneys appointed a Committee to draft a set of suggested amendments to the standard forms for the use of Council members.

I was asked to chair the committee, not necessarily because I was an expert on construction law, but because I was, and still am, a full-time staff attorney and because I had produced a comprehensive set of amendments to the standard forms for my school board. Fortunately, the Committee consisted of several attorneys who were actively engaged in construction law and litigation.[1]

In June of 1987, when the 1987 edition of the family of AIA construction contracts was published, we had completed a review and a suggested set of revisions for the AIA Form B141, Owner/Architect Agreement, 1977 Edition. Our committee went back to work and by July of 1988 we had completed a review of the AIA 1987 editions of the Owner/Architect Agreement, B141, the Owner/Contractor Agreement, A101, and the General Conditions of the Contract for Construction, A201, and prepared a set of suggested amendments, additions and deletions to those contracts for the North Carolina Council of School Attorneys.

1. Members of the Construction Committee: Fleming Bell, Inst. of Govern.; Chapel Hill; Jones P. Byrd, Asheville City Schools; Koy E. Dawkins, Monroe City Schools; Phillip R. Dixon; Pitt County Schools; John W. Hardy, Guilford and L. Wardlaw Lamar, Nash County Schools.

As a part of our review process, the Committee met on several occasions with the leadership of the North Carolina Chapter of the AIA and its attorney. Personally, I found those meetings very worthwhile. The discussions substantially increased our knowledge and understanding of the contract documents and gave us a better appreciation of the architects' reasons for many of the changes contained in the 1987 edition.

Time will not permit me to review all of the suggested amendments that our Committee developed for the 1987 Edition of the AIA Standard Forms. Many of those amendments would be of little value to those attorneys who do not practice in a state like North Carolina which requires that public construction contracts be awarded by competitive bids to multiple prime contractors.[2] The law does not allow a board of education to contract solely with a general contractor. The AIA standard forms contemplate the more common and traditional contractual arrangement in which the Owner contracts solely with a general contractor for the construction of the project, who in turn contracts with various subcontractors. If your state or school board requires that the owner contract with multiple prime contractors, the AIA standard forms must be amended. The work of our Committee may be of interest to you.

This presentation will be limited to a review of the Owner-Architect Agreement and those provisions of the General Conditions which affect the Owner-Architect relationship.

II. The Nature of the Owner-Architect Relationship/Agreement

The construction of a school is inherently an extremely complex process. It is further complicated by the competitive relationships between and among various parties involved in the project, some of whom may have been strangers to one another prior to the award of the construction contracts. Each is driven by economic self interest to make a profit on the project. In order for the project to be constructed successfully, however, the various parties should or must work as a team and, to a certain extent, compromise their individual interests for the common goal of all - to build the school on time and in accordance with the plans and specifications set forth in the contract documents.

There are two views of the architect's role in this process. In the opinion of many owners, the architect is the owner's representative on the project. Although an independent contractor, the architect is viewed in practical, if not legal, terms as the owner's agent. He is employed to carry out the wishes of the owner. Architects tend to view their role more as independent contractors. During the construction phase particularly, they consider themselves to be judges of the performance of both the owner and the contractor. By way of analogy, the project may be described as an

2. N.C.G.S. §143-128

athletic contest with the Generals Conditions, plans and specifications establishing the rules of play and with the architect acting as the referee. Like a referee in a football game, the architect has or should have some limited authority to penalize the players for rules violations. However, this analogy begs the same question that plagues all sports. What happens when the referee blows a call?

It is this tendency of architects to see their role less as the owner's representative on the project and more as an independent observer of the work that has caused many owners to employ the newest players in the construction game, the construction manager. Architects also have created an economic demand for construction managers by limitng the scope of their "Basic" services and shifting what used to be "Basic" services to "additional" services for which they charge an additional fee.

Owners, therefore, need to seriously consider the following issues as they begin their planning for a construction project:

A. Whether they want the Architect to serve as a representative of the owner on the project or to serve more as an independent party;

B. Whether they want to expand the scope of the architect's basic services; and

C. Whether they want to employ a construction manager.

After answering these questions, the owner needs to discuss its perceptions of the role and responsibilities of the architect with the architectural firms it is considering for the project until there is a mutual meeting of the minds. Some architects may be uncomfortable assuming a role that is aligned more toward the interests of the owner and some may increase their fees substantially if they are asked to increase the scope of their basic services. Others may not.

All too often, owners do not consider these issues and do not discuss them with the architect. They don't read or adequately understand the terms and conditions of the AIA standard form agreement. They simply sign the form presented to them without a mutual meeting of the minds concerning the role and responsibilities of the architect.

It is the duty of the attorney for the owner to familiarize himself or herself with the terms and conditions of the Owner-Architect Agreement and to advise the client as to its contents. The attorney should endeavor to ensure that the owner understands the role and responsibilities of the architect as set forth in the contract. If the owner is dissatisfied with the contract, he should assist the owner in negotiating a new or amended contract with the architect.

III. The Contract Form

An owner may obtain form construction contracts from a variety of sources. Some states have developed standard form agreements for public construction contracts. The Association of General Contractors (AGC) has published a set of construction documents. The National Society of Professional Engineers and the American Society of Civil Engineers have produced the Engineers Joint Contract Documents (EJCDC). A school board may direct its attorney to draft its own set of construction contracts. However, the most widely used and generally accepted forms are those produced by the American Institute of Architects (AIA).

The advantages of using the AIA forms are:

A. Architects, contractors and the courts are familiar with the language of the AIA contract documents. There will be less confusion and misunderstandings of the terms and conditions of the contract. In addition, radical changes in the duties and responsibilities of the parties may increase the cost of the project. Even if the owner does not intend to increase a contractor's responsibilities, simply the risk of an adverse interpretation of the contract by the courts may cause a contractor to raise its bid.

B. The AIA contracts are comprehensive. The AIA expends considerable time and effort developing its forms. They are reviewed and updated approximately every ten years to bring them up to date with the state of the art in the construction industry in terms of both technology and the delivery of services, and to take into account changes in the law. As a result, they address almost every contingency which could arise on a construction project.

C. They are a family of contracts. In 1987, the AIA published new editions of twelve different form agreements. Although each addresses a different contractual relationship, they are consistent with one another. (While in general this is an advantage, it is a disadvantage to an owner who wants to amend one of the agreements since the owner will have to locate, identify and amend all similar clauses in each contract.)

D. The AIA sought and received comments and suggestions from all interested parties within the construction industry, both owners and contractors, during its process of developing the 1987 editions of the standard forms.

The Construction Contracts Committee of the North Carolina Council of School Attorneys recommended to its members that they use either the AIA standard forms or the North Carolina State forms but with substantial amendments to each family of contract documents.

IV. An analysis of the AIA Owner-Architect Agreement (B141) And Suggested Amendments

A. General Comments:

1. The role of the architect is inconsistently described in B141. Paragraph 2.6.4 states that "The architect shall be a representative of the owner. . . " but "only to the extent provided in this Agreement unless otherwise modified by written instrument." (emphasis added). Paragraph 2.6.15, on the other hand, declares that "the architect shall interpret and decide matters concerning performance of the owner and contractor. . . " Paragraph 2.6.16 goes on to say that "when making such interpretations and initial decisions, the architect shall endeavor to secure faithful performance by both the owner and contractor, shall not show partiality to either, and shall not be liable for results of interpretations or decision so rendered in good faith." (emphasis added)

The inconsistency of the contract is exascerbated by architects who, during the employment process, emphasize their roles as the owner's representative and fail to note or explain paragraphs 2.6.15 and .16. Based on our committee's discussions with the leadership of the NCAIA, the architects are either unclear of their role or they actually intend to communicate inconsistent messages to the two parties with whom they work. They want to be perceived by the owner as its representative on the project and, at the same time, lead the contractor to believe that they will be impartial when interpreting its performance of the work.

If an owner desires greater clarity or consistency of the architect's role or responsibility to act as its representative on the project, it should amend paragraphs 2.6.15 and .16.

2. There has been a gradual shift of architectural services from "Basic" to "Additional" as B141 has been revised. Architects generally have not reduced their fees for basic services despite this shift. In the opinion of our committee, many school systems need some of those services which have been shifted due to the typical school administrator's lack of the time, knowledge and experience needed to successfully plan and supervise a major construction project.

The owner may want to negotiate an amendment of B141 which shifts certain services from "Additional" services back to "Basic Services." This may be accomplished with little or no increase in the fee for architectural services depending upon the amount of competition within the market in which you are located. For example, our committee suggested moving the following additional services to Basic:

Paragraph 3.3.3. Evaluating contractor's proposals.

Paragraph 3.3.4. Evaluating substitutions proposed by the contractor.

Paragraph 3.3.7. Evaluating claims submitted by the contractor or others.

Paragraph 3.3.8. Providing services in connection with public hearings.

Paragraph 3.4.1. Providing an analysis of the owner's needs and programming the requirements of the project.

Paragraph 3.4.6. Investigating existing conditions.

Paragraph 3.4.8. Providing coordination of construction performed by separate contractors, if like North Carolina, the owner contracts with multiple prime contractors.

Paragraph 3.4.16. Preparing a set of reproducible record drawings.

3. The 1987 Edition contains new language which defines more narrowly the responsibilities of the Architect in order to limit the Architect's liability.

B. Section by section analysis of B141, 1987 Edition

ARTICLE 1, ARCHITECT'S RESPONSIBILITIES -

This article acts both as an introduction to the Agreement and as a substantive section. It contains one of the 1987 edition's major improvements: a requirement that the architect submit to the owner for its approval a schedule for the performance of the architect's services. It weakens the positive effects of this addition by allowing the schedule to be "adjusted as the Project proceeds" without clearly stating how such adjustments are made. We recommend that paragraph 1.1.2 be amended to state that adjustments in the architect's schedule may be made by "mutual agreement of the parties."

An interesting and significant omission in the Standard Form Agreement is a reasonably clear statement of the standard of performance expected of the architect. Paragraph 1.1.2 infers a standard of ordinary professional skill and care. A owner may want to add a new paragraph to Article 1 which establishes either a higher or a more definitive standard of performance. After considering several alternatives, our Committee, in consultation with the NCAIA representatives, developed the following relatively simple statement: "The architect represents that he will follow the standards of his profession in performing all services under this Agreement." The term "standards of his profession" refers to all published standards of the AIA as well as to those standards of performance reasonably inferred from professional publications in the architectural field.

ARTICLE 2, SCOPE OF ARCHITECT'S BASIC SERVICES -

2.1.1. - This subparagraph defines the scope of the Architect's Basic Services as those stated in the standard form plus those identified in Article 12, a blank section of the form for adding additional services to Basic which owners should take advantage of as suggested previously.

The subparagraph also limits the scope of engineering services to "normal, structural, mechanical and electrical engineering services." Since some projects may require additional engineering services and since many school administrators do not have the knowledge or experience to know when additional engineering services are needed, we suggest adding at the end of 2.2.1 the phrase "and any other engineering services necessary to produce a reasonably complete and accurate set of construction documents, as described in paragraph 2.4, except those engineering services provided by the owner as set forth in Article 4."

2.2.1. - This subparagraph begins the description of the architect's duties during the Schematic Design Phase of the Project. Our committee suggests that the architect review and analyze the program furnished by the owner to ascertain the requirements of the Project. Under the Standard Form, providing analyses of the owner's needs and programming requirements is an "Additional Services." (See: subparagraph 3.4.1.) We believe that it is and should be a Basic Service.

We also suggest that the architect be required in 2.2.1 to commit his understanding of the owner's programming requirements to writing and to submit a copy to the owner for approval before proceeding with drafting preliminary designs.

2.2.4 - An omission in the duties of the architect during the Schematic Design Phase should be corrected by amending this subparagraph to state that the design documents shall contemplate compliance (or simply shall comply) with an all applicable laws, statutes, ordinances, codes, rules, and regulations in force as of the date of the Agreement.

2.4.1. - We are now in the Construction Document Phase of the Agreement. Based on the Approved Design Development Documents and any adjustments in them authorized by the owner, the architect is required to prepare, for the owner's approval, the Construction Documents. At this point, we suggest that the owner amend the contract to the address the selection and employment of engineering services.

We believe that it is the duty of the architect to select engineers that are qualified by training and experience in their respective fields to address the specific requirements of the Project. However, we also suggest that the architect be required to submit to the owner for the owner's approval, which should not be unreasonably withheld, a list of the engineers to be employed on the project. While most owners are not in a position to assess the qualifications of various engineers (hence, the reason for placing this responsibility on the architect), an owner may have had a bad experience with an engineering firm which it does not want to repeat.

Finally, the owner should require the architect to ensure that each engineer place his seal, name and signature on those drawings and specifications prepared by him.

2.4.1. This subparagraph states that the architect shall <u>assist</u> the owner in the preparation of bidding information and forms. Based on our experience, the architect, after consultation with the owner, is primarily responsible for the preparation of bidding information and bidding forms and the contract should be amended to reflect that the architect has this responsibility.

2.4.4 - In this subparagraph, the architect's duty is described as assisting the owner in connection with filing documents required for approval of governmental authorities. Since many school administrators may not know what documents have to be filed, or where to file them, we suggest that this subparagraph be amended to require the architect, with the assistance of the owner, to be responsible for filing documents required for approval of various governmental authorities.

2.4.5. - (new) An omission in the standard form which may be corrected by adding a subparagrph 2.4.5 is requiring the architect to include in the bidding information, plans or specifications a requirement that the contractor provide operation manuals and adequate training for the owner in the operation of mechanical, electrical, heating and air conditiong systems installed by the contractor.

2.5.2. - Another addition that our committee suggests be included in the Agreement is a subparagraph stating that if the lowest bid (or bids) exceeds the budget for the for the Project (or exceeds the budget by a certain percent), the architect, in consultation with and at the direction of the owner, shall provide such modifications in the contract documents as necessary to bring the cost of the project within its budget. By adding this subparagraph within the Architect's Basic Services, he must provide these services with no additional cost. If the architect's fee is based on a percentage of the project's construction cost, this additional subparagraph is essential. Otherwise, it may be to the architect's advantage to produce a set of plans which exceed the budget.

2.6.1. - This, the first subparagraph within the Construction Phase, contains a significant and unreasonable time limit on the architect's responsibility to provide Basic Services. Under the Agreement, the construction phase terminates at the earlier of the issuance of the final certificate of payment or 60 days after the date of substantial completion of the work. First of this, this language must be read in conjunction with subparagraph 11.5.1 which also states a time limit on Basic Services. The effect of these provisions is illustrated as follows:

Illustration 1

Time Line

1	2	3	4	5
Award of Contract	14 mo.	16 mo.	18 mo.	20 mo.

As shown on illustration No. 1 above, if the date of substantial completion occurs fourteen months after the award of the contract (2), and the final certificate of payment isn't issued until after 18 months (4), the architect is entitled to be paid as an additional service for any services rendered more than 60 days after substantial completion (from point 3 to 4 on above time line). This is true even if the contract's term as stated in subparagraph 11.5.1 is eighteen months.

On the other hand, if substantial completion occurs at 18 months (4), the architect is entitled to be paid as an additional service for any services rendered thereafter under the provisions of subparagraph 11.5.1.

Our committee suggest amending 2.6.1 to provide that Basic Services do not terminate until the architect issues the final certificate for payment to the owner.

2.6.4. - As mentioned previously, this subparagraph established the architect's duty to represent the owner during construction until final payment is due to the contractor but it further provides that any services rendered after final payment (even if performed within the contract's term as set forth in 11.5.1) are additional services. We do not agree with this latter condition and suggested that it be deleted.

2.6.5 This is one of the most important provisions of the Agreement. It establishes the architect's duty to visit the site at appropriate intervals; to observe or inspect the work of the contractor; and to determine if the work is being performed in accordance with the contract documents. Unfortunately, the Agreement is not nearly so straight forward. The 1987 amendments have made the ambiguous language of the 1977 edition even more ambiguous. This is one of the more obvious changes designed to limit the scope of the architect's duties and legal liability. We strongly suggest that the subparagraph be rewritten to remove as much ambiguity as possible, such as:

The architect shall visit the site not less than once per week while work is in progress, and as often as necessary and appropriate to the stage of construction, to inspect the site and work; to familiarize himself with the progress and quality of the work; and to determine for the owner's benefit and protection if the work is proceeding in accordance with the intent of the contract documents and construction schedule. On the basis of his on-site observations and inspections as an architect, the architect shall keep the owner informed of the progress and quality of the work and he shall use reasonable care to guard the owner against defects and deficiencies in the work and against the contractor's failure to carry out the work in accordance with the intent of the construction documents and the construction schedule. The architect shall provide services made necessary by major defect or deficiencies in the work of the contractor which through reasonable care should have been discovered by the architect and promptly reported to the owner and contractor but which he failed so to do.

This is a major revision of subparagraph 2.6.5 of the Agreement. You may expect that architects will object to these changes. They much prefer the word "observations" to the word "inspections" although most courts interpret them the same. They also contend that it is the constrctors's duty and not the architect's duty to complete the work in accordance with the contract documents. However, if the owner definitely wants someone representing the interests of the owner during the construction phase, the wording of this subparagraph is significant.

2.6.6. - This subparagraph is equally important. In it, the architect establishes that he is not responsible for construction means, methods, techniques, sequences and procedures. The Agreement goes too far, however, in stating that these functions are solely the responsibility of the contractor and that phrase should be deleted. In addition, the next sentence should be deleted because the architect does have some responsibility for the construction schedules and for the contractor's carrying out the work in accordance with the contract documents.

2.6.10. - The architect's duties with respect to the issuance of certificates for payment are described in this subparagraph. It is suggested that the architect's certification be based on his "inspections" as well as his observations of the site. We also suggest that some or all of the phrase - "to the best of the architect's knowledge, information and belief" - be deleted from the sixth and seventh lines of the subparagraph. The architect's certificate should be based on his actual knowledge of the quality of the work. Finally, we suggest that in the last sentence

of 2.6.10, the owner should delete causes (1) and (3). Clause (1) provides that the architect has not made exhaustive or continuous on-site inspectins which is not necessarily true. Clause (3) states that the architect has not reviewed requisitions received from subcontractors and materials suppliers and other data requested by the owner when the owner may request, from time to time that such information be checked.

2.6.11 - It should be the responsibility of the architect to reject work which does not conform to the contract documents. 2.6.11 merely gives him the "authority" to reject non-conforming work.

2.6.12. - The architect's duty to review and approve the contractor's submittals such as shop drawings is described in 2.6.12. We suggest that the exculpatory language be removed by deleting the words "but only" and "limited" in the third line. The purpose of the architect's review and approval would then be clearly stated "for the purpose of checking conformance with information given and the design concept expressed in the contract documents."

2.6.15. - This subparagraph gives the architect the authority to "decide" matters concerning the performance of the owner as well as the contractor. We believe this provision conflicts with the architect's role as the representative of the owner and should be amended by deleting the words "owner and" in the second line.

2.6.16. - Similar amendments should be made in this subparagraph if you want it clearly understood that the architect is the owner's representative on the project.

2.6.17. - This subparagraph makes the architect the final authority with respect to aesthetic effect. If your owner wants to have that authority, this subparagraph should be amended or deleted.

2.6.19. - 2.6.19 contains a reference to arbitration of disputes concerning the architect's decisions. If you prefer not to allow for arbitration, you need to amend this subparagraph.

Article 3. Additional Services

Article 3, Additional Services contains one of the major structural changes of the agreement. It divides additional services into three categories: (1) Representation

Beyond Basic Services; (2) Contingent Additional Services; and (3) Optional Additional Services. The section on "Project Representation Beyond Basic Services," 3.2., is not new. While it does raise a legitimate question of how much on-site representation is actually provided or required without the purchase of this additional service, it does provide a reasonable alternative to the employment of a construction manager for those owners who desire that a representative of the owner be on the site on a daily basis.

It is the division of other additional services into those which are "contingent" and those which are "optional" that is a major structural and conceptual change. In general, contingent additional services are those services made necessary or desirable by an unforeseen event or some change in circumstances arising after the execution of the agreement. In the opinion of the AIA, most owners should want and should expect to pay an additional fee for these services. Optional additional services, on the other hand, are, as the name implies, purely optional.

3.1.1 In deference to the concept of contingent additional services as being services which the owner ought to want, subparagraph 3.1.1 establishes a procedure which simply requires the architect to notify the owner prior to commencing a contingent additional service. The owner must notify the architect in writing if it doesn't think the service is required. No time period is described in the agreement for this notice and response. While our Committee generally accepts the spirit and intent of this procedure, we believe that the owner should require the architect to notify the owner in writing and advise the owner of the need for a contingent additional service prior to commencing the service.

3.3.1 Minor changes in the drawings and specifications of a project are more the norm than the exception. In order to protect the owner from excessive claims for additional fees under the provisions of this subparagraph, the owner should consider inserting the word "material" in front of the word "revisions" in the first line of the subparagraph.

3.3.2 If the architect's fee for basic services is based on a percentage of the construction cost, subparagraph 3.3.2 should be amended to provide that the architect is not entitled to an additional fee for providing services made necessary because of a significant increase in the size, quality or complexity of the project when the change will result in a significant increase in the construction cost and, therefore, the architect's fee for basic services.

3.3.3 Based on this subparagraph, services performed in connection with administering change orders and construction change directives (a new term and concept) are contingent additional services. While our Committee doesn't disagree with this provision generally, we suggest that "evaluating contractor's proposals" for possible change orders should be a basic service and should be deleted from 3.3. and that the subparagraph should be qualified by adding the phrase "provided such change orders and construction change directives are required by causes not within the control of the architect."

3.3.4, 3.3.7 and 3.3.8 As suggested previously, we believe that 3.3.4 and 3.3.7 are basic services and should be removed from Article 3. In subparagraph 3.3.8, we suggest deleting the words "public hearing" since an architect employed by a public agency, like a school board, should be expected to attend public hearings concerning the project.

3.4.1, 3.4.6, 3.4.8, 3.4.16. Again, our Committee suggests that, in general, the services described in these subparagraphs should be considered basic services rather than optional additional services.

3.4.18. This subparagraph needs to be amended to be consistent with subparagraph 2.6.1 concerning the point in time when basic services ends and additional services begins - - after the issuance of the final certificate for payment except as provided by 11.5.1.

ARTICLE 4, OWNER'S RESPONSIBILITIES

The owner certainly needs to be familiar with its responsibilities under the agreement.

4.1. This subparagraph requires the owner to provide "full information" regarding the requirements for the project to the architect. Some feel that this provision exaggerates the owner's responsibilities. Depending on the capability of the owner's staff to comply with 4.1, the owner may leave it as written or may want to amend it in the first line to read "the owner shall consult with the architect regarding. . ." Our Committee believes that the owner should provide full information about its requirements to the architect to avoid a lack of mutual understanding about the projects at its inception.

For your information, the owner's responsibilities also include: establishing the budget for the project; appointing a representative authorized to act for the owner; furnishing surveys and property descriptions; furnishing geo-techinical engineering services to conduct soil test; paying for various structural, mechanical, chemical, air and water pollution test; and furnishing legal, accounting and insurance counseling services.

4.10 This paragraph requires the owner to give the architect prompt written notice if it becomes aware of any defect in the project. This duty should be qualified by adding the following phrase: ". . . but the owner's failure or omission to do so shall not relieve the architect of his responsibilities hereunder and the owner shall have no duty of observation, inspection or investigation." Those functions are the responsibility of the architect.

ARTICLE 5, CONSTRUCTION COST

This article is releveant only if the architect's fee is based on the construction cost. If the owner negotiates a fixed fee agreement, it should be deleted entirely.

However, if the architect's fee is based on the construction cost, the article needs to be retained but should be amended.

5.1.2. Since a project may be terminated at any phase of its progress, the owner should consider amending this subparagraph to clarify how the construction cost will be determined during each phase such as:

5.1.2.1. During the Schematic Design, Design Development and Construction Document Phases, Construction Cost shall be determined by the owner's budget for the Project.

5.1.2.1 During the bidding and negotiation phase, construction costs shall be determined by the lowest responsible bid or bids.

5.1.2.3. During the Construction Phase, construction cost shall be determined by the contract sum as stated in the Owner-Contractor Agreement, AIA Document A101 as amended by any change orders formally approved the owner and contractor.

ARTICLE 6, USE OF ARCHITECT'S DRAWINGS, SPECIFICATIONS AND OTHER DOCUMENTS

This article is intended to establish the architect's ownership and complete authority to control and limit the future use of the Design Documents that he develops for a project. Architects appear to have two reasons for claiming ownership of these documents, one economic and one legal. Ecomomically, they want to ensure that owners have to employ their services each time the owner constructs a new project rather than simply re-using the same set of plans for another project. Legally, they fear the potential legal liability which might result from an owner's re-using an old set of plans for a new project. To a certain extent, both reasons are legitimate concerns.

Owners, on the other hand, often feel that they have purchased the architect's plans and, therefore, have obtained all incidents of ownership relative to them. These differing perceptions need to be resolved in some way in order to achieve a mutual agreement between the parties.

While many state forms require the architect to acknowledge the owner's ownership of the construction document, our Committee suggests a compromise. We do not opposed the architect's retaining ownership of the documents provided that he authorizes the owner to use the documents when making future additions or renovations of the project with the understanding that the architect shall be relieved of any liability as a result of such future use of the documents.

ARTICLE 7, ARBITRATION

I suspect that most attorneys representing owners recommend deleting the arbitration article from this agreement. Our Committee suggests, as a compromise, that Article 7 be amended to allow (not require) voluntary arbitration and further that the parties not be bound by the Construction Industry Arbitration Rules of the American Arbitration Association but that they may agree to use any reasonable method of arbitrating a claim or dispute.

ARTICLE 8 - TERMINATION, SUSPENSION OR ABANDONMENT

8.1 This paragraph authorizes either party to terminate the agreement for cause, provided seven days written is given to the other party. The agreement does not specifically require that the cause or reason for the termination be stated in writing.

If the architect terminates the agreement due to some failure of the owner to perform, the architect is entitled to be paid "termination expenses." Termination expenses are a form of liquidated damages. If termination occurs before or during the schematic design phase, the architect is entitled to receive 20% of the total compensation earned up to the date of termination. The amount decreases to ten percent if termination occurs during the Design Development Phase and to five percent if termination occurs after the Design Development Phase

The owner also is required to pay the above termination expenses if the owner decides to abandon the Project or to terminate the architect through no fault of the architect.

Based on our Committee's review of the economic impact of a contract termination on an architectural firm, we concluded that the termination expenses described in the agreement are not unreasonable.

On the other hand, if the agreement is terminated by the owner for cause attributable to the architect, the agreement should clearly state that the architect shall receive no fees or reimburseable expenses other than those due for services actually rendered prior to the date of termination and further that the architect maybe held liable for those actual damages suffered by the owner due to the architect's failure to perform as provided in the agreement.

8.2 An owner may want to increase the amount of time stated in this paragraph from 30 days to 9 days or longer. Our Committee determined that a 30-day suspension of a public project is too short a period of time to warrant an adjustment in the architect's compensation.

8.3 Owners should consider amending this paragraph to allow the owner to terminate the agreement without cause even if the Project is not abandoned with the understanding that the owner will pay those termination expenses described in paragraph 8.7

Article 9 Miscellaneous Provisions

9.1 This paragraph should be amended to provide that the agreement shall be governed by the site of the Project, not the law of the principal place of business of the architect.

9.2 If the Owner-Architect Agreement is amended, corresponding amendments must be made in the General Conditions, AIA Document A201; therefore, this paragraph needs to be amended by adding at its end the phrase: "except as modified by the owner."

9.3 This paragraph should be deleted since it may accelerate the tolling of the statute of limitations and limit the right of the owner to seek relief for latent defects in the design or construction of a project.

10.2 Certain items listed as Reimburseable Expenses should be included within Basic Services. Our Committee suggests the following deletions and amendments in section 10.2:

10.2.1.1 Delete "expense of transportation in connection with the Project" and "expense of long distance telephone communications."

10.2.1.2 The architect should be required to provide a certain number of reproductions of the drawings, specifications and other documents as a part of Basic Services.

10.2.1.5 Delete this paragraph. The owner should establish prior to negotiating its agreement with the architect the insurance coverages and limits required of the architect and should require that the insurance be provided within the architect's fee for Basic Services. It may surprise some owners to learn that some architectural firms do not routinely purchase and maintain liability insurance. Unfortunatley, some owners have not seemed aware of this practice until after they have made a claim against an architect.

10.2.1.6 Delete this paragraph also. At this point in time, computer-aided design and drafting is becoming quite common and should be included within Basic Services.

Article 11 Basis of Compensation

11.1 Our Committee objects to an initial payment as provided in paragraph 11.1.

11.2.2 Owners should scrutinize the percentages that the architect inserts in this subparagraph. Some architects may request a disproportionately high percentage of their fee during the early phases of the agreement.

11.4.1 Reimburseable expenses should be billed at 100% of their cost and not at a multiple of their cost.

11.5.3 This subparagraph authorizes the architect to increase the rates and multiples set forth for additional services annually in accordance with salary review practices of the architect. Many owners might object to such a provision. If so, it should be deleted.

Article 12. Other Conditions or Services

While the AIA form is quite comprehensive, our Committee suggests that the owner consider adding additional paragraphs.

We suggest that a paragraph be added making it a duty of the architect, as a part of Basic Services, to make a written record of all meetings, conferences, discussions and decisions made between or among the owner, architect and contractor during all phases of the project and concerning any material condition in the requirements, scope, performance and/or sequence of the work and to provide a copy of such records to the owner and contractor upon request.

As mentioned previously, the form agreement contains no insurance requirement. Therefore, we suggest that a paragraph be added which requires the architect to purchase and maintain in force and effect liability insurance coverage which provide a broad form of coverage and stated limits (depending upon the size and complexity of the project).

V. Form of Agreement

One final suggestion, rather than produce a totally revised agreement which incorporates the various amendments, additions and deletions suggested, we suggest that the owner mark on the face of the standard form those paragraphs which are amended and attach a document containing the amendments. In this way, the architect will readily know which language of the standard form has been changed.